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Workmen's Compensation

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WORKMEN'S COMPENSATION

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This tenth survey covers the legislative changes in the Workmen's Compensation Act[1] which were adopted by the 1970 and 1971 session of the Florida Legislature, and all related, reported judicial decisions since publication of the last survey.[2]

The 1970 legislature adopted eleven amendments and repealed three subsections of the Workmen's Compensation Act. The effect of this legislative action was to provide that employers and employees covered by the Workmen's Compensation Act could no longer reject the Act, thereby making workmen's compensation coverage compulsory, effective September 1, 1970.[3] The 1971 session further amended the statute to eliminate

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1. FLA. STAT. ch. 440.

2. This survey includes cases appearing in volumes 219 through 250 of the Southern Reporter, Second Series, and laws enacted by the 1970 and 1971 sessions of the Florida Legislature. *Florida Workmen's Compensation, 1935-1950 Survey of Florida Law*, 5 MIAMI L.Q. 74 (1950); Clements, *Workmen's Compensation, 1950-1959 Survey of Florida Law*, 8 MIAMI L.Q. 469 (1954); Schroll, *Workmen's Compensation, 1954-1959 Survey of Florida Law*, 14 U. MIAMI L. REV. 154 (1959); Schroll, *Workmen's Compensation, 1959-1961 Survey of Florida Law*, 16 U. MIAMI L. REV. 216 (1961); Schroll, *Workmen's Compensation, 1961-1963 Survey of Florida Law*, 18 U. MIAMI L. REV. 398 (1963); Schroll, *Workmen's Compensation, 1963-1965 Survey of Florida Law*, 20 U. MIAMI L. REV. 277 (1965); Schroll, *Workmen's Compensation, 1965-1967 Survey of Florida Law*, 22 U. MIAMI L. REV. 608 (1968); Schroll, *Workmen's Compensation, 1967-1969 Survey of Florida Law*, 24 U. MIAMI L. REV. 516 (1970).

3. Fla. Laws 1970, ch. 70-148, *amending* FLA. STAT. §§ 440.03, 440.05, 440.06 (1969), *repealing* FLA. STAT. §§ 440.04(1), 440.07, 440.08 (1969).

the validity of any agreement by the employee to waive his rights under the Workmen's Compensation Act.[4]

The exclusive remedy of workmen's compensation and elimination of other liability of the employer was fortified by the 1970 legislative session. The employer's immunity was extended to the workmen's compensation insurance carrier, service agent, or safety consultant when assisting the employer in carrying out the employer's rights and responsibilities under the Workmen's Compensation Act. When such persons furnish any safety inspection, safety consultant service, or other safety service incidental to the workmen's compensation or employer's liability coverage or to the workmen's compensation or employer's liability servicing contract, they too will have the immunity of an employer. A limitation of the exclusion from liability was included in those circumstances where the injury or death is proximately caused by willful or unprovoked physical aggression or by the negligent operation of a motor vehicle by the employees, officers, or directors of the insurance carrier, safety agent, or safety consultant of the employer.[5] The 1971 legislative session extended the employer's exclusive liability to apply to third party tort-feasors.[6] These two legislative changes were, in large measure, the result of judicial decisions.[7]

The 1970 legislative session increased the weekly compensation benefits from 49 to 56 dollars.[8] Also, the session added a provision for payment of an additional forty weeks of temporary total disability benefits where an individual, though having reached maximum medical improvement, is undergoing rehabilitative efforts.[9] Attempts were made to provide for deduction of compensation previously paid for preexisting permanent partial disability where the preexisting disability merges with a subsequent permanent partial disability from and injury or occupational disease. However, it is provided that in no event shall the compensation for the subsequent permanent partial disability be less than that allowed for the degree of disability that would have resulted from the subsequent injury or occupational disease if the previous disability had not existed. The deduction appears to be limited to workmen's compensation benefits previously paid under the Florida Workmen's Compensation Act for permanent partial disability, impairment, or disease.[10] Through further amendment, the 1970 legislative session required the employer or carrier to give thirty days notice to the injured employee of his intention to institute suit against a third party tort-feasor in those instances where the injured

4. Fla. Laws 1971, ch. 71-136, *amending* FLA. STAT. § 440.21 (1969).
5. FLA. STAT. § 440.11(2) (Supp. 1970).
6. Fla. Laws 1971, ch. 71-190, *amending* FLA. STAT. § 440.11(1) (Supp. 1970).
7. *See* sections XVIII and XIX *infra.*
8. FLA. STAT. § 440.12 (Supp. 1970).
9. FLA. STAT. § 440.15(2) (Supp. 1970).
10. FLA. STAT. § 440.15(5)(c) (Supp. 1970).

employee fails to bring the suit within one year from the date of accrual of the action.[11]

The number of Judges of Industrial Claims was increased to twenty-five in 1970, and authority was given to the Division to require revocation of a carrier's license if the insurance carrier fails to comply with its obligations under the Workmen's Compensation Act.[12] The 1971 legislative session extended the benefits of the Workmen's Compensation Act to turpentine labor, labor in processing gum spirits of turpentine, crude gum, oleo rosin, and gum rosin (these employees having been previously excluded),[13] and brought partial coverage to agricultural labor.[14] In addition, the salaries of Judges of Industrial Claims was increased from $18,500 to $22,500 per year.[15] Lastly, these provisions of the Workmen's Compensation Act permitting fines and punishments were generally overhauled. Violations of the act are second degree misdemeanors, and punishment is provided for in accordance with sections 775.082 and 775.083 of the Florida statutes.[16] Additional language changes were made in various sections to comply with the language used under the Governmental Reorganization Act of 1969.

One hundred thirty-four judicial opinions dealing with workmen's compensation were handed down by the Supreme Court of Florida during the period covered by this survey. An additional fourteen opinions were issued by the district courts of appeal.

I. Special Disability Fund

The statutory procedure of having the responsibility of the Special Disability Fund determined by a separate proceeding[17] was commented on in the case of *Cypress Gardens Citrus Products, Inc. v. Murchison.*[18] In that case, the claimant had preexisting degenerative disc disease and arthritis at the time he sustained two separate back injuries. It was determined that the claimant suffered a 37 percent medical disability of which 12 percent was due to the latter accident and 25 percent due to the preexisting degenerative disc disease and arthritis. The result of both conditions was permanent total disability. The supreme court reviewed the statements contained in the order awarding permanent total disability as well as its prior decisions and stated:

Certain allusions and language used in some of this Court's

11. Fla. Stat. § 440.39(4) (Supp. 1970).
12. Fla. Stat. § 440.45(1) (Supp. 1970); Fla. Stat. § 440.52 (Supp. 1970).
13. Fla. Laws 1971, ch. 71-80, *repealing* Fla. Stat. § 440.02(1)(c)(5) (1969).
14. Fla. Laws 1971, ch. 71-80, *amending* Fla. Stat. § 440.02(1)(e)(3) (1969).
15. Fla. Laws 1971, ch. 71-290, *amending* Fla. Stat. § 440.45(3) (Supp. 1970).
16. Fla. Laws 1971, ch. 71-136, *amending* Fla. Stat. §§ 440.13(2), 440.21(1), 440.34 (3)(b), 440.37, 440.38(4)(b), 440.43, 440.46(1)(c) (1969).
17. Fla. Stat. § 440.49 (1969).
18. 240 So.2d 803 (Fla. 1970).

> opinions may have given the impression that the Judge of Industrial Claims has a duty in the original claim to make certain findings and an allocation of the cause of disability to use in and govern claim proceedings for reimbursement from the Special Disability Fund. Such findings as whether there was a merger between the pre-existing condition or disease and the industrial accident, the proportion of disability attributable to each cause, and whether the employer knew of the pre-existing condition or not are findings which, if made by the Judge of Industrial Claims in the original claim proceeding, cannot bind in any manner whatsoever the findings and conclusions to be made in a separate proceeding against the Special Disability Fund. Any language in prior decisions which might have unfortunately implied to the contrary is hereby clarified. Although if members of the Legislature we might have written the law differently in such a manner as to require the Fund to appear as a party in any case involving possible Fund liability, the law is not so structured and any comments from this bench implying otherwise are contrary to its clear intent.[19]

The separate claim concept contained in the statute has continued through the 1970 and 1971 sessions of the legislature. This concept was factually emphasized in the combined cases of *Hartford Accident and Indemnity Co. v. Special Disability Fund* and *Aetna Casualty and Surety Company v. Special Disability Fund.*[20] The cases involved an employee who was injured in three separate accidents while employed by the City of Hialeah. He was found to have sustained a 15 percent permanent partial disability and 14 percent loss of wage earning capacity as a result of the first accident, a 28 percent loss of wage earning capacity from the second accident, and a 28 percent loss of wage earning capacity from the third accident. The claimant had been paid the 14 percent disability resulting from the first accident by the time of the award of compensation for the second and third accidents. Workmen's compensation insurance coverage was afforded by two different companies on the second and third accidents and both companies subsequently made a claim against the Special Disability Fund for reimbursement. Through separate proceedings, it was found that the 28 percent disability award for the second accident was the result of the merged effect of the first accident and the second accident and that the second accident caused one-half of the 28 percent disability awarded. Thus the carrier on the second accident was entitled to reimbursement from the Special Disability Fund. A similar finding was made on the third accident. On review, the Industrial Relations Commission reversed the reimbursement awards. The Commission believed that the claimant had an overall 70 percent loss of wage earning capacity as a result of all three accidents

19. *Id.* at 806-07.
20. 249 So.2d 673 (Fla. 1971).

which the carriers were not ordered to pay. In addition, the total award of 56 percent was directly attributable to the second and third accidents and, therefore, no excess had been provided to the claimant by either of the carriers. Thus, there were no amounts paid out for which the Special Disability Fund should be responsible. In reversing the Commission and reinstating the reimbursement award, the supreme court modified its prior decision of *Cypress Gardens Citrus Products, Inc. v. Murchison*[21] and stated:

> In most cases the entire disability will and should be provided for by employer-carrier in successive injury or pre-existing disability or disease cases, but an anomalous situation of this kind (being pre-*Stephens* and *Evans*) should not go unreimbursed by the Fund in the face of an uncontradicted finding of 'excess' compensation being made in a merger case. Our holding in the *Cypress Garden Citrus Products* case was not intended to legally preclude reimbursement from the Fund of pro-tanto 'excess' liability payments of employers or carriers but rather was a statement of the fact that employer-carrier in most cases compensates a handicapped worker for his entire disability where his pre-existing condition is known to employer.[22]

The concept of merger of successive disabilities was before the court in the case of *Davis v. Conger Life Insurance Company*.[23] In that case, the claimant suffered a heart attack which resulted in his absence from work for approximately ninety days. He returned to his job with the understanding that his hours of actual work would be less than before the accident. Subsequently, and while employed by the same company, the claimant suffered a compensable injury to his back, *i.e.*, a herniated disk. An award was entered on the finding that the claimant had sustained a 25 percent permanent partial disability of the body as a whole as a result of the heart attack and a 15 percent permanent partial disability of the body as a whole resulting from the herniated disc. The two injuries merged to cause a total loss of wage earning capacity. In affirming the award, the court rejected the argument of the employer and carrier that no merger took place since the injuries involved were not related. Rather, the court gave the term "merger" a broader construction and stated:

> Reinjury to a previously injured part of the body is not the only way merger can occur. Merger can result from successive injuries to separate parts of the body which have the combined total effect of creating a greater degree of disability to the body as a whole and a claimant's wage-earning capacity than would have

21. 240 So.2d 803 (Fla. 1970).

22. Hartford Accident and Indemnity Co. v. Special Disability Fund, 249 So.2d 673, 676-77 (Fla. 1971).

23. 201 So.2d 727 (Fla. 1967).

> resulted from the last injury considered by itself and not in conjunction with a previous injury.[24]

The court further stated:

> Merger is not a condition that automatically arises upon the mere occurrence of successive injuries which may or may not have a combined disabling effect upon a claimant within the contemplation of the Workmen's Compensation statute. It is a condition the finding and determination of which must be supported by competent substantial evidence in accord with logic and reason in order to be compensable.[25]

Awards were entered in several other cases on the basis of merger of successive disabilities. For example, an award of full benefits was upheld where a five percent disability to a leg was found to have merged with a prior back condition to result in 50 percent permanent partial disability.[26] A permanent total award was made based upon the merging of a job-connected, 25 percent disability of the right knee and a preexisting amputation of a right hand and left leg.[27] The court allowed a permanent total award resulting from an aggravation and merger of an accident producing traumatic colitis in a claimant who was suffering from preexisting psychiatric conditions.[28] Also, the supreme court upheld an award of permanent total disability resulting from successive back injuries which produced no disability until the last accident.[29]

In *San Juan v. Hart Properties, Inc.*,[30] a claimant had sustained a low back injury for which he was being compensated for 20 percent permanent partial disability. While employed by the same employer, he sustained a second injury resulting in a five percent disability of the neck. The Judge of Industrial Claims found that the two disabilities merged and awarded the claimant compensation benefits for a 25 percent permanent partial disability. However, the award also provided that the employer be given credit for all permanent partial disability payments previously paid. On review, it was held that the claimant was entitled to the full 25 percent permanent partial disability without credit for any of the prior compensation benefits already paid on the 20 percent preexisting disability. However, the court went on to hold that any compensation due and remaining for the prior 20 percent disability need not be paid once payments are commenced on the second or merged injury.

The failure to apply the provisions of the Special Disability Fund was found to represent a denial of essential requirements of law in the

24. *Id.* at 729.
25. *Id.* at 730.
26. Harris v. Lenk, 224 So.2d 283 (Fla. 1969).
27. Florida State Turnpike Authority v. Garvey, 234 So.2d 354 (Fla. 1970).
28. Golden Isles Pavillion v. Stamford, 234 So.2d 664 (Fla. 1970).
29. Steele v. Pendarvis Chevrolet, Inc., 220 So.2d 372 (Fla. 1969).
30. 248 So.2d 466 (Fla. 1971). For the legislative change regarding credit, see FLA. STAT. § 440.15(5)(c) (Supp. 1970).

case of *Williams v. North Broward Hospital District*.[31] In that case, the claimant suffered from preexisting degenerative spinal disease which was progressive but with which she was able to work. She slipped while working and sustained a fracture of the left hip. Medical care and compensation benefits were provided for the hip fracture. Upon attaining maximum medical recovery, the claimant was voluntarily compensated for a five percent disability of the leg. A claim for permanent total disability benefits was denied by the Judge of Industrial Claims, who found the claimant was totally disabled and had no earning capacity at the time of her accident. In reversing the case and remanding it for reconsideration, the court noted that the result reached by the Judge of Industrial Claims was paradoxical. The claimant was working on her job, admittedly with an open, obvious disability known to the employer. Her work was passable and the Judge of Industrial Claims did not consider her employer-known preexisting disability apportionable as a predicate for Special Disability Fund consideration.

II. APPORTIONMENT

The doctrine of apportionment was held to be inapplicable in the case of *Tracy v. Americana Hotel*.[32] In that case, the claimant, a chambermaid, became irritated when a coemployee removed linen from her cart. After obtaining new linen and while still upset, the claimant threw a sheet across a bed she was making. Suddenly the claimant collapsed, having sustained a ruptured aneurysm as a result of a significant rise in blood pressure. The Judge of Industrial Claims apportioned the permanent disability arising out of the accident in equal measure with the preexisting hypertensive disease. On certiorari, the supreme court reviewed its prior decisions and reversed the order of the Judge of Industrial Claims. The supreme court stated:

> [A]pportionment only applies where the preexisting disease is shown to produce disability manifested at the time of the accident or where due to normal progress, independent of the accident, such disease is shown to produce disability at the time of the award. There is no substantial evidence in this case that claimant's hypertensive disease was subject to percentage apportionment as a disabling element.[33]

The necessity of adequate findings of fact where preexisting disabilities of diseases are involved was restated in *Hardware Mutual Insurance Company v. Cardwell*.[34] There, the Judge of Industrial Claims acknowledged the facts requiring apportionment, but then found appor-

31. 247 So.2d 59 (Fla. 1971).
32. 234 So.2d 641 (Fla. 1970).
33. *Id.* at 643.
34. 227 So.2d 484 (Fla. 1969).

tionment was not indicated. After noting the inconsistency in the order of the Judge of Industrial Claims, the supreme court remanded the cause. The supreme court stated that a proper ruling on apportionment is essential to the employer's right to proceed against the Special Disability Fund for reimbursement. Furthermore, the determination of the "excess compensation" that the employer is required to pay must be made at the time the claim for compensation is adjudicated.[35]

III. Heart Cases

During the period surveyed, the two cases involving heart attacks, being factual only, left the law in heart cases unchanged. In *Warman v. Metropolitan Dade County*,[36] the claimant was a 54-year-old heavy equipment operator who suffered a heart attack while digging and chopping weeds. He was doing the work to determine what would be necessary to complete the job with the heavy equipment he was operating. Under the facts of the case, the digging was unusual activity and resulted in the heart attack. An award of compensation benefits was reinstated by the supreme court under the competent substantial evidence rule. In *Clayton v. Lease-Way Transportation Corp.*,[37] the claimant, a driver of a concrete mixer truck, suffered a myocardial infarction one minute after picking up and throwing aside a mortar-covered plank weighing from 50 to 75 pounds. He had cast the plank aside to prevent him and his helper from tripping over it while unloading the concrete. The court reinstated an award of compensation benefits and stated:

> [W]hen disabling heart attacks are involved and where such heart conditions are precipitated by work-connected exertion affecting a pre-existing non-disabling heart disease, such injuries are compensable only if the employee was at the time subject to unusual strain or over-exertion not routine to the type of work he was accustomed to performing.[38]

Both of the foregoing cases were affirmed under the theory of competent substantial evidence to support the award.

IV. Disability Benefits

A. *Occupational Diseases*

In the only occupational disease case reported during the period surveyed, a reversal of an award for compensation benefits was quashed

35. For the application of the doctrine of apportionment without utilization of the Special Disability Fund, see Lane v. Pipeline Constr. Co., 222 So.2d 19 (Fla. 1969) (dissenting opinion).

36. 228 So.2d 908 (Fla. 1969).

37. 236 So.2d 765 (Fla. 1970).

38. *Id.* at 766.

and the cause was remanded.[39] The disease involved in the case was contact dermatitis which allegedly developed by the use of "Tide," a detergent provided by the employer and used in cleaning baking tables. Despite the inadequacies of the record, the court remanded the cause to afford the claimant an additional opportunity to meet the requirements of the occupational disease section of the statute which requires the identification of the chemicals involved and the manner and amount of exposure. The court pointed out that if the substance causing the dermatitis was shown to be a common household detergent, the Judge of Industrial Claims must find that the extent and manner of the claimant's exposure exceeded that of the general public so as to constitute a "particular hazard" of her employment as required by the statute. The court emphasized that evidence adequate to establish other types of compensation claims is not sufficient to meet the requirements of the occupational disease section of the statute.[40]

In *Brito v. Advance Metal Products, Inc.*,[41] a welder was exposed to smoke while welding over a period of six years. He developed a sudden inability to breathe through his nose while welding. A physician characterized the condition as one caused by the fumes and smoke which came from welding. The Judge of the Industrial Claims found it to have been an accident, but he was reversed by the Industrial Relations Commission on its determination that the claimant had not been exposed to more smoke than he normally encountered in his work. The Commission also found that fumes other than from welding, such as automobile fumes or those from smoking, could also cause a condition from which the claimant was suffering. In quoting from prior decisions, the supreme court quashed the reversal by the Industrial Relations Commission and reinstated the award on the accident theory rather than upon an occupational disease theory. The court noted that the fundamental accidental nature of the injury was not altered by the fact that, instead of a single occurrence, it was the cumulative effect of inhalation of dust and fumes to which the claimant was peculiarly susceptible.

B. *Temporary Benefits*

Temporary disability benefits of a continuing nature were awarded a claimant in *Canfield v. Concreform Company*.[42] The award was for continuing temporary partial disability to a claimant who had sustained a broken leg while employed on a summer job as a carpenter. The claimant regularly attended college during the day and worked at night as a gas station attendant. Following the injury, the claimant returned to college

39. Norman v. Morrison Food Service, 245 So.2d 234 (Fla. 1971).

40. FLA. STAT. § 440.15(1) (Supp. 1970).

41. 244 So.2d 428 (Fla. 1971).

42. 243 So.2d 569 (Fla. 1971).

for the fall term but failed to reach maximum medical improvement. The employer paid temporary total disability until October and then offered the claimant a daytime job as a lookout, which the claimant declined to accept. Medical testimony established that the lookout job, if it required prolonged standing and exposure to hazards of falling on rough ground on construction sites, was not advisable. The court, in upholding an award of temporary partial disability, noted that the claimant was unable to work as a carpenter or as a service station attendant and was not required to accept the job as a lookout. His school attendance was held to be immaterial.

The maximum statutory limitation of 350 weeks for temporary total disability was imposed in *Thompson v. Industrial Commission.*[43] The claimant continued as temporarily totally disabled but without further receipt of compensation for this classification of disability. The denial of temporary total disability was reversed in *Bays v. Board of County Commissioners.*[44] The court held that the quality of the evidence proffered by the claimant was sufficiently competent and substantial as opposed to the defenses which did not have the same quality. The defenses were merely inferences which were insufficient to deny the claimant's status as temporarily and totally disabled.

Temporary total disability was defined as the healing period during which the claimant is totally unable to work due to his injury. It continues as long as recovery and lasting improvement of the injured person's condition can reasonably be expected. The date of maximum improvement marks the end of temporary disability and the beginning of permanent disability. Determination of the maximum recovery date which marks the end of temporary disability is not to be determined by hindsight.

> The nature of medical treatment is not to be determined by the ultimate success or failure of the treatments. Treatments are curative in nature if administered or prescribed by a qualified physician with the reasonable expectation that they will bring about some degree of recovery.[45]

In *McMahon v. Huntington,*[46] a claimant reached maximum medical recovery but was suffering from a chronic anxiety reaction. An examining physician felt that the claimant needed further psychiatric treatment but that the best treatment would be for him to begin working again. Therefore the finding of the Judge of Industrial Claims that the claimant reached maximum medical recovery was upheld.

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43. 224 So.2d 286 (Fla. 1969). A special concurring opinion indicated that the decision should be without prejudice so as to allow establishment of an early maximum recovery date and the institution retroactively of permanent total disability benefits.

44. 232 So.2d 391 (Fla. 1970).

45. Corral v. McCrory Corp., 228 So.2d 900, 902-03 (Fla. 1969).

46. 246 So.2d 743 (Fla. 1971).

C. *Permanent Disability Benefits*

In all compensation cases dealing with a permanent partial disability, a finding of maximum medical improvement is essential.[47] Disability for compensation purposes is grounded both on loss of wage earning capacity and on actual physical impairment. In measuring the loss of wage earning capacity no single factor is conclusive. In *Walker v. Electronic Products Engineering Company*,[48] the supreme court summarized the criteria announced in prior decisions by which loss of wage earning capacity may be measured as follows:

1. Extent of actual physical impairment;
2. Claimant's age;
3. Industrial history;
4. Education of claimant;
5. Inability to obtain work of a type which claimant can perform in light of his after-injury condition;
6. Wages actually earned after the injury (a factor entitled to great weight);
7. Claimant's ability to compete in the open labor market for the remainder of his life, including the burden of pain or inability to perform the required labor;
8. Claimant's continued employment in the same employ.[49]

In *Abbenant v. United Parcel Service, Inc.*,[50] the previous judicial holdings regarding permanent total disability were restated. The court held that where a worker's injury permits him to perform only limited services so that a reasonable job in the market does not exist, he may be classified as totally disabled under the Florida Workmen's Compensation Law. A workman does not have to be absolutely helpless for all purposes to be classified as totally disabled under the act.

In *Ross v. Roy*,[51] an award of 50 percent permanent partial disability to the body as a whole, resulting from a broken leg suffered by a 63-year-old claimant possessing a third grade education, was reversed. The court held that the record justified the finding that the claimant was permanently and totally disabled within the meaning of the Florida Workmen's Compensation Act. The court's conclusion was not affected by the scheduled nature of the claimant's original injury, since the impact of the scheduled injury had been eliminated by the finding of permanent total disability.[52]

47. Brock v. Sey Constr. Corp., 237 So.2d 160 (Fla. 1970).

48. 248 So.2d 161 (Fla. 1971). For a competent substantial evidence case involving an award of 40 percent loss of wage earning capacity, see Tenbroeck v. North Broward Hosp. Dist., 243 So.2d 592 (Fla. 1971).

49. Walker v. Electronic Prod. Eng'r Co., 248 So.2d 161, 163 (Fla. 1971).

50. 241 So.2d 1 (Fla. 1970). Here, the Judge of Industrial Claims found the claimant to be 50 percent disabled and apportioned the 50 percent award. The original injury was a cut finger which, as a result of medical care, resulted in a stroke. The 50 percent award and its apportionment were both reversed and the cause remanded for further consideration.

51. 234 So.2d 99 (Fla. 1970).

52. For additional permanent total awards supported by competent substantial evidence,

V. Medical Benefits

Little activity has taken place in the medical benefits section of the Workmen's Compensation Act.[53] In *Davis v. Conger Life Insurance Company*,[54] a treating physician retained the services of a heart specialist. The consultation and treatment by the heart specialist were found to be reasonably secondary to the services performed by the treating physician. Therefore, the employer and carrier were responsible for payment of the specialist's fee even though there was no request or authority for a medical consultation. Payment of medical bills was also upheld where a claimant selected her own physicians after being advised by the employer's representative that she could see any doctor that she wished.[55]

An apportioned award for nursing attendance services was upheld in the case of *Pan American World Airways, Inc. v. Weaver*.[56] In that case, the injured workman's condition was such that he required an unlicensed practical nurse full-time in the dual capacity of nurse and housekeeper. The workman was able to dress himself, prepare and take his own medication, feed himself, and perform bathroom functions unassisted. However, he was unable to make his bed, clean his house or do his own shopping. These activities were carried out by the workman's attendant who also prepared his food, did his laundry and carried on his general correspondence. The attendant also performed the functions usually carried out by a practical nurse, such as administering medicines and assisting the workman in bathing. The practical nursing care was held to be compensable. However, the attendant's care which would not mitigate or relieve the effects of the injuries and which were personal was held to be noncompensable.[57]

VI. Coverage

Florida Statutes section 440.02(1)(b)(2) (1969), defines employment covered by the act in which three or more employees are employed by the same employer. The section was construed in *Sudler v. Sun Oil Company*,[58] wherein the Judge of Industrial Claims held that the employer was not covered under the Workmen's Compensation Act since he did not have three or more full-time employees. In reversing the order,

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see Florida Turnpike Auth. v. Garvey, 234 So.2d 354 (Fla. 1970). *See also* South Atlantic Ship Builders, Inc. v. Taylor, 234 So.2d 97 (Fla. 1970).

53. Fla. Stat. § 440.13 (1969).

54. 201 So.2d 727 (Fla. 1967).

55. Repasky v. Juniors Restaurant, 224 So.2d 289 (Fla. 1969). For a concurring opinion setting forth the power of selection of a physician and authority of the Judge of Industrial Claims to determine disputes regarding medical selections, see Perez v. F. W. Woolworth Co., 220 So.2d 904 (Fla. 1969).

56. 226 So.2d 801 (Fla. 1969).

57. Practical nursing care was upheld in McHahon v. Huntington, 246 So.2d 743 (Fla. 1971). Denial of medical care through self-deterioration and estoppel was upheld in John E. Feldman, Inc. v. Hires, 225 So.2d 519 (1969).

58. 227 So.2d 482 (Fla. 1969).

the supreme court held that the act applies where there are three or more regular employees regardless of the hours of their work.

The fact that an accident or a death occurs outside Florida does not preclude coverage under the Florida Workmen's Compensation Act. In *Hanover Insurance Company v. Industrial Commission*,[59] a workman was killed in the Bahamas while working for a Florida corporation. The workman's employment was not exclusively outside of the state. At the time of the accident, his employer had two insurance carriers. Benefits were granted under the Florida Workmen's Compensation Act for which the insurance companies were jointly and equally liable.

Judicial disfavor over the lack of coverage for farm workers was apparent in *Miranda v. Southern Farm Bureau Casualty Insurance Company*.[60] In that decision, the supreme court reviewed the background of the exclusion of agricultural workers from benefits under the Workmen's Compensation Act as well as decisions establishing exceptions to the exclusion. The court then affirmed an award of benefits to a field foreman who was found by a Judge of Industrial Claims not to be engaged in "agricultural labor" within the meaning and intent of the Florida Workmen's Act.

In *Fernandez v. Consolidated Box Company*,[61] an employee was assaulted while changing a tire on his own vehicle. The vehicle was parked on a street which intersected with the employer's premises and which was used by the employees for parking. The court held the injury compensable as one having occurred on the employer's premises. The evidence indicated that while legal title to the street reposed with the City of Tampa, the employer had encroached upon it to the extent that the status of the street became a factual issue which was resolved in the claimant's favor.[62]

Generally, accidents occurring when the employee is going to, or coming from, work are not covered under the act and, therefore, are not compensable. However, in *Grillo v. Gurney Beauty Shops Company*,[63] the traveling supervisor was injured while returning from her employer's place of business in North Carolina to her home in Florida. Evidence that the employer provided an airline credit card so that the employee could fly or rent a car at any time supported the claimant's theory of an implied contract to furnish transportation between North Carolina and Florida. The furnishing of transportation by the employer was held to be an exception to the "going-to-and-coming-from" rule.[64] However, where the furnished transportation was not used for its intended purpose but rather

59. 234 So.2d 661 (Fla. 1970).

60. 229 So.2d 232 (Fla. 1969).

61. 249 So.2d 434 (Fla. 1971).

62. For a denial of benefits to an employee who slipped on a public sidewalk and fell forward into the open entrance of the employer's building where she injured her arm when it struck the second and third steps leading to the lobby, see Greenberg v. Creative Group Advertising, 219 So.2d 433 (Fla. 1969) (dissenting opinion).

63. 249 So.2d 13 (Fla. 1971).

64. Huddock v. Grant Motor Co., 228 So.2d 898 (Fla. 1969).

on a personal mission, an accident while on the personal mission in the company provided vehicle was held noncompensable.[65] The special meeting or special mission exception to the "going-to-and-coming-from" rule was upheld in *Krause v. West Lumber Company*.[66] In *Warg v. City of Miami Springs*,[67] the occupational exception to the "going-to-and-coming-from" rule was affirmed. In the *Warg* case, the claimant was a policeman who was going home from work in his own vehicle when involved in an accident within the city limits of the City of Miami Springs. In its opinion, the court reviewed its prior decisions as well as decisions from other jurisdictions and reinstated the award of compensability.

Coverage questions regarding loaned employees and special employers require the establishment of a contract, express or implied, between the special employer and the employee. Since the contract is frequently an implied one, factors demonstrating a consensual relationship, such as benefits, right of control, and payment of compensation must be proved. These factors were found to be absent in *Shelby Mutual Insurance Company v. Aetna Insurance Company*,[68] where the death of the employee was held to remain with the general employer.

VII. The Compensable Accident

In order to receive compensation, it is incumbent upon the claimant to show only that he sustained injury as an unexpected result flowing from the performance of his employment activities.[69] The denial of benefits due to lack of accident was reversed in *Wilhelm v. Westminster Presbyterian Church*.[70] In *Wilhelm*, the claimant, a 64-year-old janitor-custodian, had helped the pastor carry a 300 pound couch down a flight of stairs. That night, the claimant experienced back discomfort and took Anacin. He returned to work in pain, which continued to persist. Seven days later, he sought medical care at which time a herniated disc was diagnosed. The Judge of Industrial Claims found no accident but, rather, that the claimant's injuries occurred in turning in bed. In reversing the denial of benefits, the supreme court noted that the claimant had no prior back injuries and that the event of carrying the 300 pound couch was a logical cause for the claimant's herniated disc, since there had been no showing of a more logical cause.

In *Tracy v. Americana Hotel*,[71] a claimant was found to have received a compensable injury when her blood pressure rose due to events of her employment and suddenly resulted in a ruptured aneurysm and conse-

65. Central Air Conditioning Co. v. Garren, 239 So.2d 497 (Fla. 1970).
66. 227 So.2d 486 (Fla. 1969).
67. 249 So.2d 3 (Fla. 1971).
68. 246 So.2d 98 (Fla. 1971).
69. Williams v. Terrazzo Associates, 224 So.2d 257 (Fla. 1968).
70. 235 So.2d 726 (Fla. 1970).
71. 234 So.2d 641 (Fla. 1970).

quent brain damage. However, in *Board of Commissioners v. Breneman*,[72] an award of death benefits was reversed due to lack of causal relationship between the claimant's injury and his employment. The claim was made that employment-connected activities resulting in stress and anxiety had elevated the deceased's blood pressure causing transient hypertension which, in turn, acted upon a congenital weakness in the employee's cerebral vascular system and resulted in his death. The court found that this contention was based on a medical "possibility" and therefore insufficient to prove a compensable injury.

In conformity with prior decisions, the finding of accident was upheld in *Brito v. Advance Metal Products, Inc.*[73] In *Brito*, the claimant, a welder for six years with the employer, had been exposed to smoke while welding. Due to the smoke and fumes of welding, he suddenly became unable to breathe through his nose. Although the claimant had a disabling preexisting condition in his nose and, on the day of the accident, he had not been exposed to more smoke than usual, the Judge of Industrial Claims granted compensation benefits. The full Commission reversed. On certiorari, the supreme court reversed the Commission and directed that the order of the Judge of Industrial Claims be reinstated holding that the ill effects of the exposure must neither occur suddenly nor be immediately related to an identifiable accident in order to be compensable.

VIII. Statute of Limitations

The doctrine of estoppel was applied in three of the five statute of limitations decisions handed down during the period surveyed. The employer was estopped to raise the statute of limitations where an authorized physician had recommended treatment but his recommendation was never communicated to the claimant until after the statute of limitations ran.[74] The doctrine of estoppel was also used to prevent the usage of the defense of the running of the statute of limitations where it was found that the claimant had been misled into believing his claim was open,[75] and where the claimant was lulled into a false sense of security.[76]

Estoppel was not applicable, and the statute was held to have run, where a claimant filed his claim six years after his accident. The claimant knew that he was receiving medical care under the employer's accident and sickness benefit program and group insurance medical benefits. In addition, although he was doing light work, he was receiving less pay.[77] A claim for benefits was also held to be barred by the running of the statute of limitations for failure to file a claim within two years after the last

72. 233 So.2d 377 (Fla. 1970).
73. 244 So.2d 428 (Fla. 1971).
74. Jenkins v. M. H. Harrison Constr. Co., 228 So.2d 911 (Fla. 1969).
75. Engle v. Deerborn School, 226 So.2d 681 (Fla. 1969).
76. Catalano v. Board of Pub. Instruction, 249 So.2d 24 (Fla. 1971).
77. Chemstrand Co. v. Enfinger, 231 So.2d 816 (Fla. 1970).

payment of compensation or after the last remedial treatment or attention provided by the employer.[78]

IX. Judge of Industrial Claims

In a workmen's compensation case, it is the responsibility of the Judge of Industrial Claims to hear the testimony and receive the evidence, to weigh the evidence including the inferences to be drawn therefrom, and to resolve conflicts in the evidence. Evidence includes the demeanor of witnesses and other facets of proof-making that are more accurately weighed by the trier of fact who presides over the hearing than by a reviewing panel scanning the cold record. The fact that evidence relied upon by the Judge of Industrial Claims may be in duspute is not grounds for disturbing his conclusions. It is the responsibility of the judge to make findings of fact grounded on the evidence; and it is settled law that these findings of fact are not to be disturbed if supported by substantial competent evidence which accords with logic and reason.[79]

In assessment of wage earning capacity, the Judge of Industrial Claims must consider whether the claimant is acutally able to perform the requirements of the type of work he was doing at the time the disability occurred.[80] He has the authority to choose the testimony of one physician over another,[81] and is in a position to evaluate the testimony and measure the credibility of witnesses.[82] Included in the powers of the Judge of Claims is the power to dismiss a claim for failure of a claimant to submit to a statutorily required medical examination or scheduled deposition.[83]

After reviewing the general policy of Workmen's Compensation Laws, it was held in the case of *Firemen's Fund Insurance Company v. Rich*,[84] that Judges of Industrial Claims have jurisdiction to determine whether an insurance policy which was terminated by its terms can remain in effect by estoppel or under an oral renewal binder.

Section 440.25(3)(c) of the Florida Statutes (1969) requires that the order of the Judge of Industrial Claims set forth the findings of "ultimate facts." In reviewing a "short form" order entered pursuant to section 440.25(3)(c), the supreme court in *Brown v. Griffin*[85] held that the term "ultimate facts" means those facts which are sufficiently definite and detailed to enable the reviewing authority to test the validity under the law of the decision resting upon those facts. In so holding, the prior

78. Wainwright v. Wainwright, Inc., 237 So.2d 154 (Fla. 1970). The statute of limitations was an additional basis for denying benefits, the Judge of Industrial Claims having found there was no waiver on the part of the employer on the merits of the case.

79. Tenbroeck v. North Broward Hosp. Dist., 243 So.2d 592 (Fla. 1971).

80. Harris v. Lenk, 224 So.2d 283 (Fla. 1969).

81. Ezell-Titterton, Inc. v. A.F.K., 234 So.2d 360 (Fla. 1969). Here, the evidence relied upon by the judge was found not to be sufficiently substantial to justify his finding.

82. Stokes v. Sabre Corp., 220 So.2d 625 (Fla. 1969).

83. John Gaul Constr. Co. v. Harbin, 247 So.2d 33 (Fla. 1971).

84. 220 So.2d 369 (Fla. 1969).

85. 229 So.2d 225 (Fla. 1969).

case law establishing the competent substantial evidence rule was adhered to.[86] The failure on the part of a Judge of Industrial Claims to consider the existing disabilities known to the employer as a predicate for Special Disability Fund consideration as well as the particular findings based on medical evaluations were held to represent a denial of essential requirements of law.[87]

The obligation of the Judge of Industrial Claims to conduct an additional evidentiary hearing where an order is reversed and remanded was clarified in *Brock v. Sey Construction Corp.*[88] There, the cause was remanded by an order authorizing the judge to conduct further hearings if necessary. The testimony upon which the prior order was based was approximately 2 years-old. The judge entered a new order without affording the parties the opportunity to present further evidence. In reversing the order, the court stated:

> All these factors merely point out the need for an additional hearing. The case was old, and it appears that the JIC merely copied the original order and added some findings. While it is true that the Full Commission remanded only for lack of sufficient findings of ultimate facts, there is no reason to believe that the ultimate facts as found are still accurate. Under these circumstances it is an abuse of discretion to fail to grant an additional hearing to allow the parties to submit further testimony.[89]

Absent mistake or fraud, a succeeding Judge of Industrial Claims cannot reconsider his predecessor's final judgments and orders upon the merits where the facts remain unchanged. In the event, however, that subsequent events may defeat a prior judgment, the successor does have the authority, even after final judgment, to make such further orders as may be necessary to effectuate the judgment. Also, where the final judgment or order is not complete, the succeeding judge may supply the element which may have been omitted. The succeeding judge does have the authority to vacate or modify interlocutory rulings or orders of his predecessor.[90]

X. The Full Commission

As an appellate review body, the full Commission has the statutory obligation to affirm, reverse, modify or remand. As far as factual matters are concerned, it must do so on the basis of the findings of fact of the trial judge and not on separate, substituted findings of its own.[91] The

86. In rapid succession, a series of cases were remanded for adequate findings of fact based upon the *Brown v. Griffin* decision.

87. Williams v. North Broward Hosp. Dist., 247 So.2d 59 (Fla. 1971). The supreme court found that the result reached by the Judge of Industrial Claims was unusual and paradoxical in light of the particular facts of the case.

88. 237 So.2d 160 (Fla. 1970).

89. *Id.* at 162.

90. Tingle v. Board of County Comm'rs, 245 So.2d 76 (Fla. 1971).

91. Painter v. Board of Pub. Instruction, 223 So.2d 33 (Fla. 1969).

full Commission is powerless to disturb findings of fact made by the Judge of Industrial Claims which are supported by competent substantial evidence.[92] The fact that there is other evidence in the record which would support a different conclusion does not give the full Commission the authority to reverse an order of the Judge of Industrial Claims.[93] Nor may a reversal be effectuated under a full Commission's finding that the order is against the manifest weight of the evidence,[94] not reasonable,[95] or upon the feeling that there is a "credibility gap."[96] However, where all the testimony has been taken by deposition the full Commission is in as good a position to measure the credibility of witnesses as is the Judge of Industrial Claims.[97]

Due process of law entitles parties to administrative review by the full Commission.[98] In *St. Moritz Hotel v. Daughrty*,[99] a supplemental order was entered by a Judge of Industrial Claims. An application for review was not timely taken from the original order but was timely taken from the second order. The application for review was dismissed as being untimely filed with the full Commission. The full Commission felt that the second, or supplemental order, did not go to the merits, but merely corrected a scrivener's error. In reversing the commission and remanding the cause to it for consideration, the supreme court stated:

> But where the modification or amendment materially changes the original order or judgment, the limitation period is said to run from the time of such modification or amendment.[100]

In *Lewis v. Sperry Auto Sales*,[101] a reversal by the full Commission of an order of the Judge of Industrial Claims without notice to the parties and without giving them opportunity to be heard was not, under the circumstances, a material departure from the essential requirements of the law. In *Lewis*, a Judge of Industrial Claims entered an order finding jurisdiction over an employer who had rejected the act. The Commission remanded the cause to permit the Judge of Industrial Claims to receive into evidence a certificate of the director of the Workmen's Compensation Act. The remand was found to be clearly in the interests of justice.

In *Industrial Commission v. Neal*,[102] it was held that the full Commission was illegally constituted in that the chairman was not impartial

92. Meadows v. Curly's Trash Serv., Inc., 244 So.2d 417 (Fla. 1971); Krause v. West Lumber Co., 227 So.2d 486 (Fla. 1969); Grims v. Super-X Drugs, Inc., 224 So.2d 301 (Fla. 1969).

93. Tenbroeck v. North Broward Hosp. Dist., 243 So.2d 592 (Fla. 1971).

94. Williams v. Alfred S. Austin Constr. Co., 224 So.2d 280 (Fla. 1969).

95. Harris v. Lenk, 224 So.2d 283 (Fla. 1969).

96. Stokes v. Sabre Corp., 220 So.2d 625 (Fla. 1969).

97. Mendivil v. Tampa Envelope Mfg. Co., 233 So.2d 5 (Fla. 1970).

98. Southgate Towers Restaurant v. Knell, 247 So.2d 57 (Fla. 1971).

99. 249 So.2d 27 (Fla. 1971).

100. *Id.* at 28.

101. 224 So.2d 293 (Fla. 1969).

102. 224 So.2d 774 (Fla. 1st Dist. 1969).

by reason of background as required by statute. However, it was noted that the Governmental Reorganization Act had changed the law and requirements regarding the chairman.

XI. Review by the Supreme Court

Judicial review of Industrial Commission orders has not changed since the last survey. The function of the court, insofar as examination of the evidence is concerned, is to ascertain whether there is evidence legally sufficient to support the finding made by the officers of the executive department whose decisions are under examination.[103] The court will not substitute its judgment for that of the Judge of Industrial Claims where there is competent substantial evidence to support the order.[104] However, in *Ezell-Tritterton, Inc. v. A.F.K.*,[105] the supreme court stated that what constitutes competent substantial evidence in an acknowledgment case must necessarily be determined from the circumstances of each individual case. The opinion in the case was a lengthy one and concerned itself with the reversal of an award of death benefits to a claimant, an alleged posthumous, illegitimate daughter of the deceased employee. The focal point of the reversal was the lack of competent substantial evidence to support the decedent's acknowledgment of parentage of the child prior to his death. The opinion of the court was not unanimous. The dissenting opinion indicated the reliance which the court normally places upon Judges of Industrial Claims to correctly evaluate and determine the credibility of the testimony.

Although it is not the function of the court to explore the record and construct factual findings at the appellate level, the court has done so where the findings of the Judge of Industrial Claims are meager.[106] Also, it has considered issues not considered by the full Commission, in order to bring judicial labor to an end.[107]

Motion practice before the court was again discouraged during the period surveyed,[108] and petitions not timely filed were dismissed.[109] Judicial review was accepted in a case in which the full Commission appeared before the court and claimed its order was interlocutory and not reviewable; the court found that there had been elements of finality in the order.[110]

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103. Brown v. Griffin, 229 So.2d 225 (Fla. 1969).

104. Clayton v. Lease-Way Transp. Corp., 236 So.2d 765 (1970).

105. 234 So.2d 360 (Fla. 1970).

106. Salazar v. Jules Gillette, Inc., 243 So.2d 138 (Fla. 1970).

107. Tracy v. Americana Hotel, 234 So.2d 641 (Fla. 1970). The court remanded the cause to the Commission for consideration of issues not determined by the full Commission in Knell v. Southgate Towers Restaurant, 235 So.2d 291 (Fla. 1970). *See also* Southgate Towers Restaurant v. Knell, 247 So.2d 57 (Fla. 1971).

108. Moore v. Grant-Sholk Constr. Co., 248 So.2d 647 (Fla. 1971).

109. Dave's Auto Parts v. Westberry, 220 So.2d 364 (Fla. 1969); Elliott v. Goodwill Indus., 220 So.2d 902 (Fla. 1969).

110. Matthews v. Seaboard Properties, Inc., 250 So.2d 849 (Fla. 1971).

XII. Average Weekly Wage

During the biennium, four cases were decided concerning average weekly wage. In the first case, a claimant was killed after working for the employer for a total period of nine days during which he earned $114.53. Of this sum, $83.13 was earned during the work week prior to his death. It was stipulated that there was no similar employee. The Judge of Industrial Claims found the average weekly wage to be $83.13. The employer and carrier sought review claiming that, at the time of the death, the employee's wage rate was $1.75 an hour for an expected 40-hour work week, or $70.00 per week. In affirming the award, it was held that the full-time weekly wages may be determined either by the contract of employment or actual earnings, according to the circumstances of each case. In the instant case, the circumstances showed that the finding of $83.13 was justified.[111] If, at the time of accident, the claimant is engaged in concurrent similar employment, the earnings derived from the concurrent similar employment may be combined with the earnings derived from the employment wherein the claimant is injured to arrive at the average weekly wage. However, if the concurrent similar employment is of a type specifically excluded from the operation of the act, *i.e.*, farm work, the earnings are not includable for average weekly work purposes.[112]

In determining average weekly wage, the amount of tips received and the reasonable value of uniforms must be included.[113] The Judge of Industrial Claims has the authority to reconcile conflicts between the claimant's assertion of the amount of tips received and the employer's business records reflecting the amount of tips reported.[114]

XIII. Attorneys' Fees

Consistent with the court's prior decision in the *Lee Engineering* case,[115] awards of attorneys' fees without any evidentiary support as to their reasonable value were consistently remanded during the period surveyed.[116] A stipulation between the parties that the Judge of Industrial Claims may set the fee was held to be insufficient in *Brock v. Sey Construction Corporation*.[117] In *Brock*, the court stated that there must be some evidence in the record to reflect the reasonable value of the services rendered.

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111. Penuel v. Central Crane Serv., 232 So.2d 739 (Fla. 1970).

112. Jay Livestock Market v. Hill, 247 So.2d 291 (Fla. 1971). The opinion in this case was not unanimous.

113. Torres v. Eden Roc Hotel, 238 So.2d 639 (Fla. 1970).

114. Cornaros v. Carillon Hotel, 235 So.2d 478 (Fla. 1970).

115. Lee Eng'r & Constr. Co. v. Fellows, 209 So.2d 454 (Fla. 1968).

116. Tenbroeck v. North Broward Hosp. Dist., 243 So.2d 592 (Fla. 1971); Southern Line Constructors v. Morris, 231 So.2d 516 (Fla. 1970); Steele v. Pendarvis Chevrolet, Inc., 220 So.2d 372 (Fla. 1969).

117. 237 So.2d 160, 163 (Fla. 1970).

In *Davis v. Edwin M. Green, Inc.*,[118] a denial by the Judge of Industrial Claims and the Industrial Relations Commission of attorneys' fees was reversed by the supreme court. The court found that:

> The Florida Workmen's Compensation Law does not contemplate that an employer may insulate itself from knowledge that benefits may be due to the claimant and then, when its wall of willfull ignorance is breached by claimant's attorney, commence "voluntary" payments and resist payment of attorneys' fees.[119]

The *Davis* court went on to consider the case of an employer who does not exercise his right to investigate and who forces the burden of proving liability on the claimant. The court held that to the extent that claimant requires the assistance of an attorney for depositions or other actions, the employer is not protected from payment of attorneys' fees. Similarly, the right to attorneys' fees is not extinquished by a dismissal of the proceedings under rule 3 and 11 where the claimant's attorney has already earned an attorney's fee and refiled the same claim after the rule 3 and 11 dismissal. However, "a different result would be proper in those cases where the second claim contains different allegations from the first and in which a decision by the employer that benefits were due would not represent a reversal of the employer's position."[120]

Three cases during the survey period involved determination of attorneys' fees where the compensation benefits had been altered at the appellate level. The cases held that where an appeal results in the alteration of workmen's compensation benefits upon which an award of attorneys' fees is based, the award of attorneys' fees must be redetermined.[121]

In *Basford v. Florida Power & Light Company*,[122] a permanent total award was made and an attorney's fee awarded based, in part, on the claimant's life expectancy. An appeal was taken and the claimant died during the appeal. The Commission reversed the award of attorneys' fees and ordered a remand for reconsideration and reduction. On certiorari, the supreme court held that the claimant's subsequent death neither terminated or reduced the prior award of attorneys' fees. However, the court further held that it was impossible to determine from the present findings whether the victory won by the claimant's attorney had any monetary significance to the claimant. In this context only, the court affirmed the remand of the cause for reconsideration of attorneys' fees.

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118. 240 So.2d 4 (Fla. 1970).

119. *Id.* at 5.

120. Schollenberger v. City of Miami, 241 So.2d 385, 387 (Fla. 1970).

121. San Juan v. Hart Properties, Inc., 248 So.2d 466 (Fla. 1971); Torres v. Eden Roc Hotel, 238 So.2d 639 (Fla. 1970); Jewel Tea Co. v. Industrial Comm'n, 235 So.2d 289 (Fla. 1969).

122. 246 So.2d 1 (Fla. 1971).

XIV. Waiver & Estoppel

In one case, the court, noting that proceedings in compensation cases are basically administrative, reversed an order of the full Commission which stated that the defense of estoppel must be pleaded.[123] The doctrine of estoppel was used in another case to estop the claimant from securing payment of nursing care where the claimant had been trained in self-care but made no attempt to care for himself or take advantage of additional training.[124] The doctrine of estoppel was indirectly presented in another case dealing with the jurisdiction of an industrial judge to determine whether an insurance policy which had terminated by its terms could remain in effect.[125] Lastly, estoppel was used in four separate cases involving the statute of limitations.[126]

Whether waiver by conduct exists is a question of fact for the Judge of Industrial Claims to determine. In *Knell v. Southgate Towers Restaurant*,[127] a waiver was determined to exist in favor of the claimant. In *Wainwright v. Wainwright, Inc.*,[128] however, no waiver was found to have taken place on behalf of the employer.

XV. Penalties

The penalty sections of the Workmen's Compensation Act were construed on three separate occasions during the biennium. The application of the 20 percent penalty to the entire benefits was conceded to be erroneous in *Grims v. Super-X Drugs, Inc.*[129] There, the original award of the Judge of Industrial Claims was remanded and subsequently reentered. The judge applied the 20 percent penalty to the entire benefits awarded under the new order which the claimant agreed was erroneous. The 20 percent penalty should have been applied to the benefits awarded in the original order and the 10 percent penalty applicable to the benefits paid thereafter.

Assessment of penalties was reversed in two separate cases where the complicated nature of the cause and pleadings were such that the penalties could not have been imposed,[130] and where the employer had no reason to be on notice that there was any claim or prospective claim.[131]

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123. Painter v. Board of Pub. Instruction, 223 So.2d 33 (Fla. 1969).

124. John E. Feldman, Inc. v. Hires, 225 So.2d 519 (Fla. 1969).

125. Firemen's Fund Ins. Co. v. Rice, 220 So.2d 369 (Fla. 1969).

126. Catalano v. Board of Pub. Instruction, 249 So.2d 24 (Fla. 1971); Chemstrand Co. v. Enfinger, 231 So.2d 816 (Fla. 1970); Jenkins v. M.H. Harrison Constr. Co., 228 So.2d 911 (Fla. 1969); Engle v. Deerborn School, 226 So.2d 681 (Fla. 1969).

127. 235 So.2d 291 (Fla. 1970).

128. 237 So.2d 154 (Fla. 1970).

129. 224 So.2d 301 (Fla. 1969).

130. Hanover Ins. Co. v. Industrial Comm'n, 234 So.2d 661 (Fla. 1970).

131. Ezell-Titterton, Inc. v. A.F.K., 234 So.2d 360 (Fla. 1970).

XVI. PROCEDURE

The procedure for filing claims with the Industrial Relations Commission has not changed since the last survey. In *Turner v. Keller Kitchen Cabinets*,[132] a claimant, through his attorney, filed a claim with the Industrial Relations Commission but subsequently withdrew the claim by letter and had a hearing cancelled. No formal order was entered dismissing the claim, but it was held that the first claim had been effectively withdrawn. Subsequently, the claimant's wife directed a letter to the Industrial Commission to inquire as to compensation benefits. The letter was construed by the Judge of Industrial Claims to be a claim, thereby tolling the statute of limitations. On review, the supreme court affirmed the order of the Judge of Industrial Claims. The court cited prior decisions to the effect that *any* paper lodged with the Commission indicating the probability that the employee has not received compensation or benefits is treated as a claim.[133]

The burden of proof is upon the claimant to prove all of the elements of his claim.[134] In occupational disease claims, however, the claimant has a greater burden of proof. Evidence adequate to establish other types of compensation claims will not meet the requirements of occupational diseases. In *Norman v. Morrison Food Services*,[135] the supreme court held:

> Further evidence is necessary to establish that claimant's contact dermatitis results from the substances used in her employment. This requires identification of the chemicals involved and the manner and amount of exposure. If the substance causing the dermatitis is shown to be a common household detergent claimant used to clean the baking tables, the Judge of Industrial Claims must find that the extent and manner of her exposure exceeds that of the "general public" so as to constitute a "particular hazard" of her employment as required by the statute.[136]

In the *Norman* case, the cause was remanded to the Judge of Industrial Claims to hold further hearings and to receive further evidence in accordance with the views expressed in the opinion. The court limited further evidentiary hearings to a period of ninety days from its opinion.

The burden of proof may be met by showing a logical cause, as was stated in *Wilhelm v. Westminster Presbyterian Church*:[137]

> However, we are also committed "to the doctrine that where a serious injury is conclusively shown and a logical cause for it is

132. 247 So.2d 35 (Fla. 1971).

133. For a split decision holding an apparent contrary view, see the earlier decision and dissenting opinion in Troyer v. Burnup & Sims, 222 So.2d 188 (Fla. 1969).

134. *See* Salazar v. Jules Gillette, Inc., 243 So.2d 138 (Fla. 1970) (elements proven in hernia case). As to burden of proof, see Carr Constr. Co. v. Fertic, 239 So.2d 245 (Fla. 1970) (dissenting opinion).

135. 245 So.2d 234 (Fla. 1971).

136. *Id.* at 238.

137. 235 So.2d 726 (Fla. 1970).

> proven, he who seeks to defeat recovery for the injury has the burden of overcoming the established proof and showing that another cause of the injury is more logical and consonant with reason."[138]

The burden shifts to the employer-carrier to establish a cause more logical and reasonable than that established by the claimant *only* when a claimant has first established a logical cause. In *Snipes v. Gilman Paper Company*,[139] there were numerous possible causes for the employee's death, some which may have been employment-connected and others possibly unrelated to employment. The Judge of Industrial Claims denied the cause for death advanced by claimant. On appeal, the supreme court found the denial was supported by competent substantial evidence. In affirming the denial, the court stated that the claimant must establish that the injury or death is caused by a single logical employment-connected cause or by any one of several logical causes or a combination thereof, all of which must necessarily be connected with the employment of the deceased. The claimant failed to establish by competent substantial evidence a logical cause for the death. Therefore, the employer-carrier had no burden to demonstrate a cause of death unrelated to decedent's employment more logical and consonant with reason than the claimant's.

In the presentation of expert medical opinion, it is necessary that the medical expert have an accurate medical history of the claimant before he testifies as to the causal relationship between the accident and the injury. In *Payette v. Gulfstream Air-Conditioning, Inc.*,[140] a false and incomplete history was given to the expert by the claimant. However, the claimant's true history was later made clear to the physician and his opinion regarding causal relationship remained the same. The award of benefits was affirmed based upon the finding that there was competent substantial evidence to support the award. In *Warman v. Metropolitan Dade County*,[141] an award was affirmed where the expert medical opinion was based on substantially correct history.

Compensation benefits were denied a claimant suffering from a rare form of cancer about which medical science knew very little. The denial was based upon lack of competent substantial evidence to support a causal relationship. It was held that there must be some clear evidence, rather than mere speculation or conjecture, establishing a causal connection between a claimant's injury and the employment. No medical evidence was presented which could connect the cancer to trauma which occurred approximately one year earlier.[142] However, in an earlier case involving injury resulting from aggravation of preexisting bulbous emphy-

138. *Id.* at 728, *quoting* Jim Rathman Cadillac, Inc. v. Barnard, 200 So.2d 161, 164 (Fla. 1967).

139. 224 So.2d 276 (Fla. 1969).

140. 224 So.2d 686 (Fla. 1969).

141. 228 So.2d 908 (Fla. 1969).

142. Police Dept. v. Hobbs, 246 So.2d 561 (Fla. 1971).

sema due to inhalation of certain gases in the course of employment, an award of benefits was upheld. In that case, the operating physician who removed a portion of both of the claimant's lungs testified that, in his opinion, exposure to the gases in question possibly could aggravate the condition. After having been given a hypothetical question setting out the circumstances of the claimant's exposure, the physician stated: "I would say that I would be strongly suspicious that emphysema was a direct result of toxic exposure."[143]

Logical inferences may be used where there is a lack of direct evidence to support a claim. In *Zipperer v. Peninsular Life Insurance Company*,[144] two salesmen whose employment required them to travel were killed in an automobile accident. The injury occurred at night in a place where they were reasonably expected to be. The facts were not in conflict. There was only a short gap in time between the last admitted employment-related activities and the accident. That gap of time was found to be insignificant when the whole evening's events were coupled with the unquestioned custom of working late in the evening. In reversing the denial of benefits, it was held that there was a fair, almost inescapable inference, that the two salesmen were pursuing the employer's business when killed.

Suspicious inferences were held insufficient to deny benefits to a female sales solicitor who sustained injury when she jumped from a window of a prospective land purchaser's apartment.[145] Such inferences were also insufficient in the case of a claimant who failed to seek medical treatment, failed to seek employment, and engaged in occasional hunting, fishing and driving during a period when the evidence established his condition to be totally disabled.[146]

In appellate review of orders of the Judges of Industrial Claims and the Industrial Commission, the competent substantial evidence law applies. However, in the celebrated case of *Ezell-Titterton, Inc. v. A. F.K.*,[147] the supreme court stated:

> But in the proper exercise of this Court's review function it should evaluate the evidence in light of certain minimal standards contemplated by the act. Without these minimal standards there will be no end to spurious and false claims in the type of case before us.[148]

Only one decision during the period surveyed dealt with the enforcement of workmen's compensation orders. In that case, the District

143. Walker v. McDonnell Aircraft Corp., 231 So.2d 210, 211 (Fla. 1970).

144. 235 So.2d 473 (Fla. 1970).

145. Shunk v. Gulf Am. Land Corp., 224 So.2d 269 (Fla. 1969).

146. Bays v. Board of County Comm'rs, 232 So.2d 391 (Fla. 1970).

147. 234 So.2d 360 (Fla. 1969). The skepticism with which the court looked upon the findings of the Judge of Industrial Claims is reflected in the court's opinion and its pronouncement regarding its function as an appellate review board.

148. *Id.* at 369 (dissenting opinion).

Court of Appeal, Third District, found that the employer had complied with the order in question and was not in default. The court stated that the authority of the trial judge was such that he "could only make inquiry as to whether or not the order was still in full force and effect and if it was, enforce its provision . . . ."[149]

XVII. COMMISSION RULES

Rules 3 and 11 came under judicial review during the survey period. In *Knight v. Munday Plastering Company*,[150] great weight was given the Industrial Commission's previous interpretations of rule 3 which conflicted with its interpretation in the instant case. The present Commission dismissed a claim which had been pending for approximately three years without any hearings ever having been scheduled thereon. In reversing the Commission, the court held that there must be a scheduled hearing before rule 3 would become operable. Once the rule is invoked, its operation becomes mandatory and cannot be relaxed by the Judge of Industrial Claims on his own motion.[151] However, the Judge of Industrial Claims, on his own motion or otherwise, may recall a witness for the purpose of clarifying his testimony in the event—and only in the event—it has not been properly recorded. He may, if it becomes necessary, appoint a disinterested physician to examine a claimant for the purpose of aiding him in reconciling conflicts in the medical evidence.[152]

Rule 6, relating to insolvency petitions, was interpreted in *Sweeney v. Pine Island Citrus Groves, Inc.*,[153] wherein it was held:

> Both the Judge of Industrial Claims and the Full Commission erred in holding that this rule was mandatory. This and other rules of the commission should be observed in the interests of expediting the speedy determination of these administrative proceedings. Such rules, however, are not mandatory. For good cause the Judge of Industrial Claims may, on application of the employer and employee, exercise his judicial discretion in granting or denying such relief. Ordinarily the exercise of such discretion will not be disturbed on review except on a clear showing of an abuse of power or an arbitrary exercise of power.[154]

Florida Appellate Rule 3.4(b)(3) provides, in part, that a three day extension be allowed for service by mail. In *Conception v. Southern*

149. Lillard v. City of Miami, 220 So.2d 413, 413-14 (Fla. 3d Dist. 1969), *quoting* Phoenix Assurance Co. v. Merritt, 160 So.2d 552, 553 (Fla. 2d Dist. 1963).
150. 220 So.2d 357 (Fla. 1968).
151. Perez v. Carillon Hotel, 231 So.2d 519 (Fla. 1970).
152. Kramer v. Chapman & Gerber, Inc., 235 So.2d 489 (Fla. 1970).
153. 234 So.2d 644 (Fla. 1970).
154. *Id.* at 645.

General Builders, Inc.,[155] the supreme court, in deciding the case on other grounds, failed to directly pass on the petitioner's argument that rule 3.4(b)(3) governs workmen's compensation review.

XVIII. Third Parties

The exclusive remedy doctrine of the Workmen's Compensation Act, which limits recovery of injured employees to Workmen's Compensation benefits, was again construed during the survey period. In *Collins v. Federated Mutual Implement & Hardward Insurance Company*,[156] an employer was in the process of building a road and required additional trucks. Trucks were leased for that purpose. The defendant was the owner and driver of one of the trucks. While operating the truck for the employer, the defendant struck and injured the plaintiff. In reversing the trial judge's finding that the defendant was an independent contractor, it was found, using the principle of the right to control, that the defendant was under the control and supervision of the employer of the plaintiff. Defendant was acting in the status of a coemployee or fellow servant and was, therefore, a third party tort-feasor under the Workmen's Compensation Act. In *Hamilton v. Shell Oil Company*,[157] the third party suit was dismissed under a finding that the plaintiff was a special employee of the defendant. In this case, the defendant had a contract with Manpower, Incorporated to supply defendant's employees.

Servicing agents for self-insured employers became defendants on two separate occasions in third party actions. In *Allen v. Employers Service Corporation*,[158] the servicing agent allegedly failed to properly perform safety inspections thereby causing injury to plaintiff. Suit was filed against the servicing agency. A summary judgment in favor of the servicing agency was affirmed on the ground that anyone who stands in the shoes of the employer, or who is in privity with the employer and undertakes to perform or assist in the performance of the statutory duties imposed on the employer, should be immune from suit as a third party tort-feasor. However, in an earlier decision of *Gallichio v. Corporate Group Service, Inc.*,[159] the claimant was covered under the Federal Longshoremen & Harbor Workers Act. He brought suit against the servicing agent for the self-insured employer, claiming the servicing agent failed to make proper safety inspections. A dismissal was reversed under the theory that the claimant was third party beneficiary and the cause was remanded. The 1970 session of the legislature amended the exclusive remedy provisions of the Workmen's Compensation Act so as to include servicing agents for self-insured employers.[160]

155. 219 So.2d 425 (Fla. 1969).
156. 247 So.2d 461 (Fla. 4th Dist. 1971).
157. 233 So.2d 179 (Fla. 4th Dist. 1970).
158. 243 So.2d 454 (Fla. 2d Dist. 1971).
159. 227 So.2d 519 (Fla. 3d Dist. 1969).
160. *See* note 5, *supra*.

In *Trail Builders Supply Company v. Reagan*,[161] an injured employee sued a manufacturer of a machine upon which he was injured and from which the employer wilfully removed a safety device. The manufacturer filed a cross-claim against the employer which the employer moved to dismiss. The suit was originally filed in federal court and the matter was referred to the Supreme Court of Florida for an opinion. The supreme court held that the employer was liable to the defendant manufacturer on the cross-claim:

> Accordingly, we hold that the Workmen's Compensation Act does not preclude a passively negligent third party tort-feasor from being indemnified by an actively negligent employer who has made payments of compensation and medical benefits to an injured employee in a suit for damages by such employee against a third party where it is alleged in the claim for idemnity that the employer's act of negligence was primarily responsible for the injury.[162]

A similar result was held in *Florida Gas Company v. Spaulding*,[163] wherein a workman was killed as a result of an explosion which occurred when the machine he was operating struck the defendant's gas main. The defendant filed a third party complaint against the employer seeking indemnity. A summary judgment in favor of the employer, affirmed by the district court of appeal, was reversed by the supreme court based upon the *Trail Builders* case. Again, the 1971 legislature acted and extended the exclusive liability of the employer to third party tort-feasors.[164]

XIX. Subrogation and Equitable Distribution

In *Aetna Casualty & Surety Company v. Bortz*,[165] it was held that during the second year following injury, a carrier who brought suit and settled the suit was nonetheless entitled to only equitable distribution from the recovery rather than full benefits. The decision was based upon a liberal construction of the act in favor of the claimant. During the second year following the accident, both the injured workman and the employer or carrier have the right to file a third party suit. The one filing the suit first has the right to maintain the cause of action.[166] Where no suit is filed during the second year, but the injured workman settled his case with the third party carrier, the compensation recovery is based upon equitable distribution rather than upon a 100 percent recovery.[167] When the injured employee initiates the third party action, the com-

161. 235 So.2d 482 (Fla. 1970).
162. *Id.* at 485.
163. 243 So.2d 129 (Fla. 1970).
164. *See* note 6, *supra.*
165. 246 So.2d 114 (Fla. 3d Dist. 1971). The decision was not unanimous, there being a dissenting opinion.
166. Jersey Ins. Co. v. Cuttriss, 220 So.2d 15 (Fla. 3d Dist. 1969).
167. Maryland Cas. Co. v. Smith, 247 So.2d 526 (Fla. 3d Dist. 1971).

pensation carrier's proper procedure is to protect its right of subrogation by the filing of a notice of payment of compensation and medical benefits. The notice is recorded, and thereafter constitutes a lien upon any judgment recovery to the extent determined by the court under the provisions of the statute. It is an improper joinder of parties for the carrier to be a party-plaintiff.[168]

Jurisdiction by Florida courts over equitable distribution of workmen's compensation benefits paid under the Florida act was held to lie in *Reznick v. Schwartz*.[169] In that case, the plaintiff was injured in Minnesota while working for a Florida corporation. Plaintiff was paid compensation under the Florida act, filed suit in federal court in Minnesota and subsequently settled the case. A lien was filed in federal court by the workmen's compensation carrier. When the parties could not agree as to the extent of equitable distribution, the plaintiff filed suit in Florida to determine the carrier's right to equitable distribution and the extent thereof. On the carrier's appeal from an award of equitable distribution, it was held that Florida had jurisdiction over the subject matter.

The extent of equitable distribution is in the discretion of the trial judge who may take into consideration the conduct of the parties.[170]

XX. Additional Decisions of Interest

In *DeCancino v. Eastern Airlines*,[171] a stewardess was injured during a flight from Florida to New York when the plane hit an air pocket over South Carolina. Initial proceedings filed in New York were dismissed after which the claimant filed a claim in Florida. The Florida claim was dismissed by the Industrial Relations Commission for lack of jurisdiction. In reversing the Commission, the court cited the statute which permits the filing of claims in both jurisdictions but permits offsetting the amount of benefits received so that the total benefits do not exceed what might have been awarded in a Florida forum.[172]

The Industrial Commission's refusal to take jurisdiction with reference to a group insurance claim was held erroneous in *Jewel Tea Company v. Industrial Commision*.[173] In that case, the plaintiff sustained injury and received benefits during the first 39 weeks of his disability through payment under a group insurance package plan to which he contributed 2 dollars a week from his salary and to which the employer also contributed. The package plan included medical benefits as well as monetary weekly benefits. The employer's claim for credit against work-

168. National Emblem Ins. Co. v. Gillingham, 241 So.2d 707 (Fla. 4th Dist. 1970).

169. 219 So.2d 713 (Fla. 1969).

170. Hardware Mut. Ins. Co. v. Roth, 222 So.2d 768 (Fla. 3d Dist. 1969); Jackson v. Singer, 221 So.2d 783 (Fla. 3d Dist. 1969).

171. 239 So.2d 15 (Fla. 1970).

172. Fla. Stat. § 440.09(1) (1969).

173. 235 So.2d 289 (Fla. 1969).

men's compensation liability for benefits paid under the insurance package plan was denied, the court holding the result to be a violation of the statute.[174] The claimant was held to be entitled to workmen's compensation in addition to any benefits under the insurance plan to which he contributed.

In *Colonial Restaurant Corporation v. Department of Commerce*,[175] members of a self-insurance fund had failed to pay their assessments. The Industrial Commission entered an order directing payment of the back assessment. The order was not complied with. A rule nisi was then sought by the trustees of the self-insurance fund. The District Court of Appeal, Third District, held that the payment of delinquent assessments may be enforced in the circuit court to the same extent as any other delinquent compensation order.

Notice to an employer of the claimant's preexisting disability was held to be established solely by the testimony of the employee in *Pompano Pipelayers Company, Inc. v. Special Disability Fund.*[176]

Under the competent substantial evidence rule, a lump sum payment in the amount of $22,250 was upheld in *Herndon v. City of Miami.*[177] In that case, the lump sum was an advance payment of compensation without an accompanying release of future liability. It was held that the judge is given vast discretion to determine the interests of the claimant and employer; that there is no mandatory requirement in the Workmen's Compensation Act that the claimant produce expert testimony to testify at a hearing to obtain an advance payment of compensation; and that the judge's order and findings should not be disturbed unless he has abused his discretion or unless there is no competent substantial evidence to support the order.

In the single modification order reviewed, the granting of modification was reversed by the Industrial Relations Commission under its conclusion that the claimant's physical condition had not changed, since it appeared that he could not work at the time of the original order under which he was granted permanent partial disability benefits and the same appeared true in the modification proceedings. The Judge of Industrial Claims found both a mistake of fact and a steady worsening of claimant's condition. In reversing the Industrial Relations Commission and reinstating the award of permanent total disability, the supreme court said:

> [T]he plain fact remains that the evidence presented in support of modification indicates a transpiration of the events cogently indicative of the incompatibility of the prior determination with the real extent of Petitioner's disabilities. . . .[T]o hold that Petitioner is not entitled to modification of the earlier determination so as to conform his compensation award to the existing

174. FLA. STAT. § 440.21 (1969).
175. 248 So.2d 494 (Fla. 4th Dist. 1971).
176. 245 So.2d 232 (Fla. 1971).
177. 224 So.2d 681 (Fla. 1969).

realities of his disability would unduly thwart the liberal purposes sought to be accomplished by F.S.A. Section 440.28.[178]

XXI. CONCLUSION

The period surveyed has seen a broadening of coverage of the Florida Workmen's Compensation Act both legislatively and judicially. The authority of the Judge of Industrial Claims in his fact finding powers was consistently supported and his powers in regulating and handling the case loads before him enhanced.

The exclusive remedy doctrine was fortified by both sessions of the legislature in order to overcome judicial decisions allowing liability, thereby eliminating possible tort liability on the part of the employer or its servicing agents.

Initial review authority is still with the full Commission. For the first time in the history of the Florida Workmen's Compensation Act, the full three-member Commission is composed entirely of lawyers. It is anticipated that there will be a significant reduction in judicial activity and a continuation of legislative broadening of benefits and coverage under the Workmen's Compensation Act in the future.

178. Arnold v. Stroud, 221 So.2d 729, 731-32 (Fla. 1969).